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\_\_\_\_\_, 2010

**DRAFT 1/07/09**

Attorney-Client Privileged

Col. Reinhard W. Koenig  
US Army Corps of Engineers, Alaska District, CEPOA-DE  
P.O. Box 6898, Elmendorf AFB  
Anchorage, Alaska 99506

John Pavitt  
US Environmental Protection Agency, Alaska Operations Office  
222 West 7<sup>th</sup> Avenue, Box 19  
Anchorage, Alaska 99513

Subject: Request to meet with Corps and EPA regarding six tribes being cooperating agencies on any EIS on a potential Pebble mine, and potential request for joint-lead agencies.

Dear Colonel Koenig and Mr. Pavitt:

I and my co-counsel, Thomas E. Meacham, represent six federally recognized tribes on matters related to a potential Pebble mine in Southwest Alaska. These tribes are: (1) the Nondalton Tribal Council, (2) Koliganek Village Council, (3) New Stuyahok Traditional Council, (4) Ekwok Village Council, (5) Curyung Tribal Council (Dillingham), and (6) Levelock Village Council. Mr. Meacham and I would like to meet with representatives of your agencies to discuss that these six tribes may request to be cooperating agencies on any environmental impact statement (EIS) on a proposed Pebble mine.

We also represent the Alaska Independent Fishermen's Marketing Association (AIFMA) and Trout Unlimited, Inc. (TU). On behalf of all eight clients, we would also discuss their potential request that joint-lead federal agencies be designated on the EIS.

**I. Our tribal clients may request cooperating-agency status.**

Our threshold concern is to discuss, sooner rather than later, tribes being cooperating agencies. The Pebble Limited Partnership (PLP) and Alaska Department of Natural Resources (DNR) have said that PLP may submit permit applications in 2010 or 2011.<sup>1</sup> Even if that schedule is delayed, the tribes need to understand what they might be undertaking as cooperating agencies. They may seek grant funds. Your agencies presumably would want to understand what service the tribes might provide as cooperating agencies.

<sup>1</sup> In June 2009, PLP said it expects permitting to commence in mid-2010. In September 2009, Northern Dynasty (part of PLP) said that PLP is positioning itself "to finalize a Prefeasibility Study and prepare for project permitting under NEPA . . . in 2010." DNR has said it expects PLP to complete plans by early to mid 2010, perhaps use the Keystone Center to invite public comment outside of and prior to an EIS process, and apply for permits in 2011.

Federal regulations provide that cooperating agencies are those having jurisdiction by law or special expertise relevant to either (1) any impact at issue in an EIS, or (2) a reasonable alternative. The regulations provide that tribes may be cooperating agencies.<sup>2</sup> Cooperating agencies should assist during scoping.<sup>3</sup> Thus, lead or joint-lead agencies should designate cooperating agencies *before* scoping. Cooperating agency status for appropriate non-federal agencies “should be routinely solicited,” and should be designated *no later* than the scoping process.<sup>4</sup> EPA recommends that Alaska tribes make early requests for cooperating agency status to address subsistence and traditional ecological knowledge.<sup>5</sup> An early discussion facilitates EPA’s recommendation.

These six tribes meet both grounds for eligibility,<sup>6</sup> and as explained below are *uniquely* positioned to do so in several respects.

**A. Regarding impacts at issue, these tribes offer knowledge of subsistence and traditional ecological knowledge.**

We would like to hear your views on whether federally-recognized tribes can assist regarding (1) impacts at issue, particularly with respect to subsistence, and (2) updating, generating and evaluating subsistence-related information that could be useful in an EIS, particularly if done in cooperation with other agencies.<sup>7</sup>

Alaskan tribes offer traditional ecological knowledge of subsistence use areas, harvest practices, and resources in the Kvichak and Nushagak drainages. Most subsistence at issue in Pebble-related matters is by members of tribes who reside in the drainages, and hunt, fish and gather resources there. These six tribes include the largest in the drainages, *i.e.*, the Curyung Tribe, which has about 2400 members. Tribal members are the substantial focus of subsistence studies by agencies and contractors of PLP. Tribal members are likely to bear direct, indirect and cumulative impacts of governmental decisions related to any proposed Pebble mine, associated facilities, and other reasonably foreseeable events if a mine is permitted.

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<sup>2</sup> 40 CFR 1508.5.

<sup>3</sup> 40 CFR 1501.6(b)(2).

<sup>4</sup> Memo for Heads of Fed. Agencies, Exec. Off. of President, CEQ, July 28, 1999, re cooperating agencies, <http://ceq.hss.doe.gov/nepa/regs/ceqcoop.pdf>. Prior to scoping, lead or joint-lead agencies are designated and they request other agencies, such as Tribes, to be cooperating agencies.

<sup>5</sup> See, EPA, <http://www.akforum.com/eProceedings/NEPA.ppt#305,1>, National Environmental Policy Act (NEPA) & Tribal Involvement at Alaska Environmental Forum (2008). DNR recommended similarly regarding large mines, and gave Pogo Mine as an example of the State and 12 tribes maintaining government-to-government relationships.

<sup>6</sup> They can also assist in scoping, as contemplated by NEPA regulations. Further, tribes as cooperating agencies also implements Executive Order 13175 and the President’s recent memorandum on tribal consultation (Mem. for Heads of Executive Departments and Agencies, re: Tribal Consultation (Nov. 5, 2009.))

<sup>7</sup> These six tribes are uniquely positioned to address the adequacy, or inadequacy, of some subsistence-related information. In *Nondalton Tribal Council, et al., v. State DNR, et al.*, Case No. 3AN-09-46 CI (3<sup>rd</sup> Jud. Dist., Alaska), these six tribes, AIFMA and TU assert that the Alaska Department of Natural Resources and its current 2005 Bristol Bay Area Plan, which applies to lands at Pebble, failed to update or rely upon its inventory of subsistence use areas, as required by state statute. For purposes of an EIS, federal agencies may need better subsistence-related information than that found in the 2005 Bristol Bay Area Plan.

**B. These tribes are in a unique position with respect to any alternatives that would propose to permit a Pebble mine.**

Federal regulations provide that to integrate an EIS into state planning processes, an EIS shall discuss any inconsistency of a proposed action with any approved state land use plan, and where inconsistency exists, the EIS should describe the extent to which the federal agency would reconcile its proposed action with the plan.<sup>8</sup> In other words, an EIS on any potential Pebble mine will have to consider the applicable state land use plan.

The principal state land use plan is the 2005 Bristol Bay Area Plan (2005 BBAP) of the Alaska Department of Natural Resources (DNR). It applies to all state lands in the Bristol Bay drainages. These include the Kvichak and Nushagak drainages which are mostly state-owned land, and which include the state land that is subject to the Pebble mining claims and most of the potential access corridor to them from Williamsport.<sup>9</sup> The State's area plans essentially perform two functions: (1) they classify units of state land according to primary uses, and (2) they adopt guidelines and statements of intent. The classifications, guidelines and statements of intent guide state land use decisions for about twenty years after a plan is adopted. Thus, all alternatives in an EIS the would permit a Pebble mine will be shaped by the pertinent land use classifications, guidelines and statements of intent of the applicable state area plan, which is currently the 2005 BBAP.

The six tribes, AIFMA and TU have sued DNR in state court to have the current the 2005 BBAP declared unlawful.<sup>10</sup> The case is still its early stages and is undecided. Most of our clients' claims challenge the *methods* that DNR used to classify state land, and establish guidelines and statements of intent. These methods, which are addressed in an accompanying enclosure,<sup>11</sup> were applied to lands at Pebble, the access corridor, and areas where Pebble-related settlement may occur. If the litigation is successful, then DNR will have to develop a new Bristol Bay Area Plan, and permit applications for a Pebble mine, if any, will be delayed. If the litigation is unsuccessful, then the 2005 BBAP will stand unless otherwise revised.

In either event, the lead federal agency (or joint-lead agencies) on an EIS would probably benefit from having both DNR and these tribes as cooperating agencies, because together they different perspectives about many factual issues related to the 2005 BBAP.<sup>12</sup> These tribes offer views that can supplement those of DNR, help develop alternatives, evaluate impacts, and inform the public and decision-makers about Pebble and the applicable area plan. On the other hand, if these tribes were not asked to be cooperating agencies, then federal agencies would be more likely to acquire an incomplete understanding of factual issues related to the 2005 BBAP and how DNR dealt with them in the 2005 BBAP. Finally, for purposes of developing and

<sup>8</sup> 40 CFR § 1506.2(d).

<sup>9</sup> DNR's 2005 BBAP also applies to state "settlement lands" where employees of PLP and others may be housed.

<sup>10</sup> *Nondalton Tribal Council, et al., v. State DNR, et al.*, Case No. 3AN-09-46 CI (3<sup>rd</sup> Jud. Dist., Alaska).

<sup>11</sup> See, accompanying letter to Rep. Bryce Edgmon and Briefing Paper, Part I, attached thereto.

<sup>12</sup> *Id.* The 2005 BBAP may also be fatal legally to an EIS that supports permits for Pebble. See Briefing Paper, Part II, attached to enclosed letter to Rep. Edgmon.

evaluating alternatives, the tribes with assistance of counsel can offer perspective on the adequacy of current state and federal subsistence laws in the context of a potential Pebble mine and potential for increased population in the area that is likely to accompany development of a Pebble mine.<sup>13</sup>

**II. Our clients may request, pursuant to 40 CFR 1501.5(d), designation of joint-lead agencies under an interagency agreement that preserves authority of all federal agencies to refer disputes to CEQ under 40 CFR 1504.**

As said at the outset, all eight of our clients (six tribes, AIFMA and TU) may request pursuant to 40 CFR 1501.5(d) that joint-lead federal agencies be designated under an interagency agreement that would preserve to each lead or cooperating federal agency its ability to refer disputes with another lead or cooperating federal agency to the President's Council on Environmental Quality (CEQ) under 40 CFR 1504. We would appreciate discussing that with appropriate Corps and EPA officials.

Thank you for your attention to these matters.

Sincerely yours,

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cc:

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Thomas Tilden, President, Curyung Tribal Council  
Raymond Apokedak, President, Levelock Village Council  
David Harsila, President, Alaska Independent Fishermen's Cooperative Association.  
Tim Bristol, Alaska Director, Trout Unlimited, Inc.  
Rep. Bryce Edgmon, Chair, Hs. Fisheries Committee, Alaska House of Representatives  
Kim Elton, Senior Advisor for Alaska Affairs, USDO, Washington, DC 20240

<sup>13</sup> See Briefing Paper, Part III, attached to enclosed letter to Rep. Edgmon. Without foreclosing any future position of our clients, we would be less than forthright if we did not acknowledge that for reasons stated in the enclosed letter to Rep. Edgmon and its attachment, and in the enclosed letter to EPA, these six tribes may support a range of alternatives in a draft EIS going out to the public only if each rests upon prior enactment of refuge or critical habitat area legislation by the Alaska Legislature, and upon prior identification of waters and wetlands under Section 404(c) of the Clean Water Act.

